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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)), is unconstitutional on its face.

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Anthony Salerno and Vincent Cafaro.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a), is not yet reported. The opinion of the district court (App., *infra*, 33a-57a) is reported at 631 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 58a-59a) was entered on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3142(e), provides in pertinent part:

> If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

STATEMENT

Respondents Anthony Salerno, the reputed leader of the Genovese organized crime family, and Vincent Cafaro, a reputed "captain" in that organization (see App., *infra*, 3a, 35a), are presently charged with various racketeering offenses and violent crimes. The United States sought pretrial detention of respondents pursuant to Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, which authorizes the detention of a criminal suspect charged with a crime of violence if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). The district court ordered the detention of respondents based on the government's "overwhelming" evidence that, if released, they would continue to engage in violent criminal behavior (App., *infra*, 47a, 55a). The court of appeals agreed that no condition of release would reasonably assure the safety of other persons and the community (*id.* at 13a). It nevertheless reversed, holding that Section 3142(e)'s authorization of pretrial detention based upon a judicial determination of future dangerous-

ness is facially unconstitutional as a violation of substantive due process (App., *infra*, 15a).

1. The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, revises the federal law governing pretrial release of criminal suspects. Section 3141 of the Act provides that a judicial officer shall determine whether an arrested person will be released or detained in accordance with the provisions of the Act. 18 U.S.C. (Supp. II) 3141. Section 3142(a) sets forth the available options. See 18 U.S.C. (Supp. II) 3142(a). The judicial officer may order that the person be: (1) released on his own recognizance or upon execution of an unsecured bond;[1] (2) released subject to various specified conditions;[2] (3) temporarily detained to permit revocation of a prior release order, deportation or exclusion;[3] or (4) detained pursuant to the provisions of subsection (e). *Ibid.*

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[1] An arrested person qualifies for unsecured release unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. (Supp. II) 3142(b).

[2] A suspect is subject to conditional release if the judicial officer determines that the person does not qualify for release upon his own recognizance or upon execution of an unsecured bond. 18 U.S.C. (Supp. II) 3142(c). Section 3142(c)(1) imposes a mandatory condition that the person refrain from violating federal, state, or local law. 18 U.S.C. (Supp. II) 3142(c)(1). It also describes some of the other monetary and nonmonetary release conditions that may be utilized. 18 U.S.C. (Supp. II) 3142(c)(2). The judicial officer must select "the least restrictive * * * conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community" (*ibid.*).

[3] The judicial officer may detain a person for up to ten days, to allow notice to the proper authorities, if the person

Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. (Supp. II) 3142(e). Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life imprisonment or death, serious drug-related crimes, and felonies committed by persons who have previously been convicted of other serious crimes. 18 U.S.C. (Supp. II) 3142 (f)(1). In addition, the judicial officer must hold a pretrial detention hearing, in response to a government request or upon his own motion, in cases involving a serious risk that the person will flee or attempt to obstruct justice. 18 U.S.C. (Supp. II) 3142(f)(2).

Section 3142(f) also specifies a series of procedural safeguards that accompany the pretrial detention hearing. The person resisting detention may request the presence of legal counsel at the hearing, may testify and present witnesses on his own behalf, may cross-examine other witnesses who appear at the hearing, and may present evidence by proffer. 18 U.S.C. (Supp. II) 3142(f). A judicial officer's findings that no conditions will reasonably assure the safety of other persons and the community "shall be supported by clear and convincing evidence" (*ibid.*).

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poses a risk of flight or danger to other persons or the community and is (1) on release pending trial or appeal; (2) on probation or parole; or (3) subject to deportation or exclusion under the immigration laws. 18 U.S.C. (Supp. II) 3142(d).

Section 3142(g) specifies the factors that a judicial officer shall take into account in considering whether to detain a criminal suspect. See 18 U. S.C. (Supp. II) 3142(g). These factors include the nature and seriousness of the charges, the weight of the evidence against the suspect, the history and characteristics of that person, and the nature and seriousness of the danger to any person or the community that would be posed by his release (*ibid.*). Finally, Section 3142(i) specifies the required contents of a detention order. See 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention, it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences, and it must direct that the person be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*).

2. On March 20, 1986, a federal grand jury returned a 29-count indictment charging respondents and 13 other members and associates of the Genovese organized crime family with various crimes, including conspiracy and substantive racketeering offenses (18 U.S.C. 1962(c) and (d)); 16 counts of mail fraud (18 U.S.C. 1341) in connection with a construction industry bid-rigging scheme; wire fraud (18 U.S.C. 1343) in connection with the election of Roy L. Williams as General President of the International Brotherhood of Teamsters; seven counts of extortion (18 U.S.C. 1951) from a New York area food company; and the operation of illegal numbers and bookmaking businesses (18 U.S.C. 1955). See App., *infra*, 2a-3a, 35a-36a. The racketeering counts of the indictment allege 35 specific racketeering

acts, including two separate murder conspiracies (*id.* at 2a-3a).

Respondents were arrested and arraigned on March 21, 1986. The United States immediately moved for pretrial detention pursuant to 18 U.S.C. (Supp. II) 3142(e), and the district court (Walker, J.) held an evidentiary hearing in accordance with 18 U.S.C. (Supp. II) 3142(f). The government submitted evidence demonstrating that respondents have engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent respondents from resuming those activities during the pendency of their trial. The government provided a detailed proffer of anticipated testimony from trial witnesses and evidence obtained through electronic surveillance to demonstrate that respondents posed a continuing danger to the community that justified pretrial detention. See App., *infra*, 2a-4a, 34a-45a.

For example, the government disclosed in its proffer that Jimmy Fratianno, a federal witness, would testify that he attended a meeting with high-ranking members of the Genovese family at which respondent Salerno and others agreed to place a "contract" for the murder of John Spencer Ullo, a California organized crime figure (App., *infra*, 37a-38a).[4] The government also disclosed that Angelo Lonardo, another federal witness who is the former "underboss" of the Cleveland organized crime family and a life-long friend of Salerno, would testify that Salerno participated in the decision to murder John Simone, a Philadelphia organized crime figure, and the separate decision to murder Danny Greene and John Nardi,

[4] This murder conspiracy ultimately failed because Ullo learned of the plan and killed the person who had been dispatched to fulfill the contract (App., *infra*, 38a).

two Cleveland organized crime figures (*id.* at 38a-39a).[5] In addition, the government disclosed evidence obtained through electronic surveillance demonstrating that Salerno and Cafaro routinely used violence to maintain control over the Genovese family's gambling, loansharking, and labor union activities (*id.* at 39a-44a).

In response, Salerno offered testimony from character witnesses and challenged the credibility of the government witnesses. Cafaro offered no evidence and contended that the electronic surveillance evidence revealed, at most, only "tough talk." App., *infra*, 44a-45a.

The district court, characterizing the evidence as "overwhelming" (App., *infra*, 47a, 55a), found that the government had established by clear and convincing evidence that "Salerno is the head, or 'Boss,' of an organization engaged in extortion, loansharking, illegal gambling, and murder" (*id.* at 47a-48a) and that "Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future" (*id.* at 55a). The court concluded (*id.* at 56a-57a):

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of [the criminal

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[5] Simone's body was found on a roadside in Staten Island, shot three times in the head (App., *infra*, 38a-39a). The plot to kill Greene and Nardi contemplated their murder in New York. However, they ultimately died in car bombings in Cleveland (*id.* at 39a).

> enterprise's] leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident.
>
> Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

The court entered an order detaining respondents.[6]

Respondents sought reconsideration of the detention decision, which the district court (Lowe, J.) denied (App., *infra*, 6a-7a). They then sought review from the court of appeals. That court first rejected Salerno's argument that the government had provided insufficient notice of its intent to use wiretap evidence, holding that Salerno lacked standing to seek suppression of that evidence (*id.* at 9a-12a). The court further concluded (*id.* at 13a) that the evidence proffered by the government "amply supported the court's findings that the government had proven by clear and convincing evidence that Salerno 'is a danger to the community as the 'Boss' of an organization that uses force, violence, and threats of

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[6] The district court issued a detention order on March 28, 1986. However, that order was not entered on the court's criminal docket. See App., *infra*, 8a. The district court later issued a virtually identical order on April 2, 1986, which was entered on the court's docket on April 7, 1986 (*ibid.*). That order, which the court of appeals treated as the relevant decision (*ibid.*), is reproduced in the appendix to this petition (*id.* at 33a-57a).

force and violence to further its illegal operations,' [quoting *id.* at 48a], and that Cafaro 'has directed violent acts and is ready, willing and able to direct violent acts in the future' [quoting *id.* at 55a]." The court nonetheless reversed the district court's detention decision, concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (*id.* at 14a).

The court agreed that a judicial officer may order pretrial detention in response to "risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process" (App., *infra*, 14a). It stated, however, that "[t]he sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence" (*id.* at 15a). The court concluded that detention for the purpose of protecting community safety is "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes" (*ibid.*). The court reasoned that, under the Due Process Clause, " 'incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.' " *Id.* at 17a (emphasis in original omitted) (quoting Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986)). The court stated that "[e]ven the risk of some serious crime, such as destruction of an airliner * * * must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by in-

carceration simply because untested evidence indicates probable cause to believe that he has committed one crime and is a risk to commit another one" (App., *infra*, 20a).

Chief Judge Feinberg dissented (App., *infra*, 23a-32a). He concluded that "detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause" (*id.* at 29a). He relied, in part, on this Court's holding in *Schall* v. *Martin*, 467 U.S. 253 (1984), that pretrial detention of juveniles based on their perceived danger to the community is compatible with due process (App., *infra*, 24a-25a), observing that the societal interest in protecting the public from violent crime "does not vary in strength with the age of the person to be detained" and that, "[i]f anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses" (*id.* at 25a).

Judge Feinberg added that while "[d]ue process also dictates that the government not pursue its goals through 'conduct that shocks the conscience' " (App., *infra*, 26a, quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)), "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement" (App., *infra*, 26a). He also concluded that the statutory pretrial detention provisions, as applied in this case, are consistent with due process (*id.* at 29a-32a).

REASONS FOR GRANTING THE PETITION

This case presents a question of great importance to the administration of the criminal law. The court of appeals' holding that the recently enacted pretrial detention provisions of the Bail Reform Act are facially unconstitutional directly frustrates Congress's attempt to protect the public from "a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons." S. Rep. 98-225, 98th Cong., 1st Sess. 6-7 (1983). The court of appeals' decision conflicts with the decisions of other courts of appeals and reflects a dramatic—and erroneous—expansion of the concept of substantive due process. This Court's review is plainly warranted.

1. Congress enacted the pretrial detention provisions of the Bail Reform Act in response to public concern, echoed by the President, the Chief Justice, and the American Bar Association, over the "alarming problem of crimes committed by persons on release" (S. Rep. 98-225, *supra*, at 3, 5-6). The Senate Committee on the Judiciary, which held extensive hearings on the matter (*id.* at 5 n.4), noted that the "broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release" (*id.* at 6).

The Committee recognized that pretrial raises constitutional questions (S. Rep. 98-225, *supra*, at 7-8), but it ultimately determined, based on its own constitutional analysis and the experience gained under

the preventive detention provisions of the District of Columbia Code (D.C. Code Ann. § 23-1322 (1981 & Supp. 1985)) that "pretrial detention is not *per se* unconstitutional" (S. Rep. 98-225, *supra*, at 8). It concluded that "pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released" (*id.* at 10).[7]

The Committee formulated the preventive detention provisions with care, observing that, while pretrial detention is not per se unconstitutional, "a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" (S. Rep. 98-225, *supra*, at 8). The Committee stated that "[t]he pretrial detention provisions of this section have been carefully drafted with these concerns in mind" (*ibid.*). The elaborate procedural safeguards embodied in Section 3142 (see, *e.g.*, pages 3-5, *supra*) reflect those efforts.

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[7] The Committee acknowledged evidence that courts had historically detained dangerous defendants through the imposition of extremely high monetary conditions (S. Rep. 98-225, *supra*, at 10-11). Criticizing that practice, the Committee stated (*id.* at 11):

> Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. * * * The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

Thus, Congress gave extensive consideration to the use of preventive detention and attempted to strike a balance between the government's compelling interest in protecting the public from crime and the defendant's interest in retaining his freedom prior to trial. The court of appeals' blanket conclusion that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (App., *infra*, 14a) completely sweeps aside Congress's effort to accommodate these important competing interests. The court's determination that this significant and carefully considered federal statute is facially unconstitutional has broad national implications that plainly justify this Court's review.

The court of appeals' decision not only strikes down an important Act of Congress, it also conflicts with the decisions of at least two other courts of appeals. Both the Third Circuit and the Seventh Circuit have rejected due process challenges to the Bail Reform Act's preventive detention provisions. See *United States* v. *Perry*, 788 F.2d 100 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986). See also *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (upholding the District of Columbia's preventive detention statute), cert. denied, 455 U.S. 1022 (1982). This Court's review is necessary to resolve the conflict.[8]

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[8] On May 2, 1986, the Second Circuit reversed a district court's detention order on due process grounds in a case that produced three separate—and inconsistent—opinions from the panel. *United States* v. *Melendez-Carrion*, *supra*. The government petitioned for rehearing with a suggestion for rehearing en banc. On June 20, 1986, the court of appeals denied that request without opinion. Thus, it appears that the Second Circuit is unwilling to address this issue en banc.

2. On the merits, we submit that the court of appeals erred in concluding that the Bail Reform Act's preventive detention provisions violate the principles of substantive due process.

The due process inquiry begins from the fundamental premise that federal statutes enjoy a presumption of validity.[9] Deference to legislative judgment is particularly appropriate in a case such as this one, where Congress has identified and considered potential due process objections and has carefully drafted the legislation to satisfy constitutional requirements. Cf. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13-14.

Even in the absence of the deference due to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government" (*Walters*, slip op. 13), this Court's decisions demonstrate that preventive detention, subject to appropriate procedural protections, comports with due process. The commands of due process reflect " 'the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.' " *Moore* v. *City of East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)).

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[9] It is, of course, "by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" * * * .' " *Exxon* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978) (quoting *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963)). "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Bowers* v. *Hardwick*, No. 84-140 (June 30, 1986), slip op. 8. See also, *e.g.*, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion).

See also *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937) (due process recognizes rights "implicit in the concept of ordered liberty"). In the criminal context, this balance, like the balance struck by the Fourth Amendment, "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975).

"The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (quoting *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960)). And "there is nothing inherently unattainable about a prediction of future criminal conduct" (*Schall*, 467 U.S. at 278-279). Thus, the use of pretrial detention, accompanied by appropriate procedural safeguards, in instances where "no condition or combination of conditions will reasonably assure * * * the safety of * * * the community" (18 U.S.C. (Supp. II) 3142(e)) is neither an "'arbitrary imposition[]'" nor a "'purposeless restraint[]'" (*Moore*, 431 U.S. at 502 (plurality opinion) (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)). Furthermore, the use of pretrial detention to protect the public from an immediate threat of harm certainly does not "shock[] the conscience" (*Rochin* v. *California*, 342 U.S. 165, 172 (1952)). Indeed, this Court has approved the use of preventive detention in closely analogous circumstances.

The court of appeals did not dispute that the government, in administering criminal justice, may impose substantial pretrial restraints on personal liberty. See App., *infra*, 14a-15a. The accommodations between the criminal justice system and a suspect's pretrial liberty are familiar features of the criminal

law.[10] The court of appeals nevertheless concluded that pretrial detention to protect the public from the proven dangers posed by a defendant is per se violative of substantive due process (*id.* at 15a-17a). That conclusion, which rejects any balancing of governmental and personal interests, conflicts with the approach consistently employed by this Court in analyzing statutory restraints on liberty challenged on substantive due process grounds.

In *Schall* v. *Martin*, *supra*, this Court rejected a due process challenge to New York's juvenile preventive detention statute, stating that the law "serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime" (467 U.S. at 274). Similarly, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court upheld the constitutionality of a federal statute authorizing pretrial detention of a potentially dangerous mentally incompetent defendant, stating that "the legislation authorizing commitment in the context of this case, involve[s] an assertion of authority, duly guarded, auxiliary to incontestable national power" (*id.* at 375). In *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953), this Court permitted the indefinite detention of a potentially dangerous resident alien upon his

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[10] See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979) (a judicial officer may detain a suspect to ensure his appearance at trial); *Gerstein*, 420 U.S. at 113-114 (police officer's assessment of probable cause provides legal justification for arrest and "a brief period of detention to take the administrative steps incident to arrest"); *United States* v. *Gotti*, No. 86-1230 (2d Cir. June 25, 1986), slip op. 4336-4337 (a court may detain a defendant to prevent him from intimidating witnesses).

return from a foreign country until an exclusion hearing could be held (*id.* at 215-216). Justice Jackson, dissenting in part, rejected the notion that "the concept of due process [is] so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered" (*id.* at 223). Likewise, in *Carlson* v. *Landon*, 342 U.S. 524 (1952), this Court upheld the detention of a potential dangerous deportable alien prior to his deportation hearing.

As these cases demonstrate, the use of pretrial detention to protect the public from particularly dangerous persons does not offend the "concept of ordered liberty" (*Palko*, 302 U.S. at 325) or values "rooted in this Nation's history and tradition" (*Moore*, 431 U.S. at 503 (footnote omitted) (plurality opinion)).[11] Pretrial detention may be used to protect the public as well as the judicial process. Indeed, the court of appeals' contrary conclusion (App., *infra*, 14a-15a) would lead to strikingly anomalous results. A court could detain the mentally incompetent—but not the intentionally vicious—dangerous defendant. It could detain an alleged street criminal who threatens a judge, juror, or witnesses, but it would have to release a suspected terrorist who threatens the President, a congressman, or the public at large. Neither the sense nor the history of this Court's substantive due process jurisprudence compels these incongruous results.

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[11] Notably, the Bail Reform Act provides far more procedural due process protections than any of the detention statutes involved in the cases cited above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUGUST TERM, 1985

Nos. 1386, 1387

Docket Nos. 86-1197, -1198

UNITED STATES OF AMERICA, APPELLEE

—*v.*—

ANTHONY SALERNO and VINCENT CAFARO,
DEFENDANTS-APPELLANTS

(Argued: May 29, 1986 Decided: July 3, 1986)

Before: FEINBERG, *Chief Judge*, NEWMAN and KEARSE, *Circuit Judges*.

KEARSE, *Circuit Judge*:

Defendants Anthony Salerno and Vincent Cafaro appeal from orders of the United States District Court for the Southern District of New York committing them to the custody of the Attorney General for pretrial detention pursuant to the Bail Reform

Act of 1984 (the "Bail Reform Act" or "Act"), 18 U.S.C. §§ 3141-3156 (Supp. II 1984), on the ground that no condition or combination of conditions of their release will reasonably assure the safety of any other person and the community. On appeal, defendants raise statutory and constitutional challenges to their continued confinement. We find no merit in their statutory arguments but agree that to the extent that § 3142(e) of the Act permits their pretrial detention on the stated ground, that section violates the Due Process Clause of the Constitution of the United States. We therefore vacate the orders of the district court, remand for the setting of conditions of bail, and stay the issue of the mandate until the mandate of this Court is issued in *United States v. Melendez-Carrion, Nos.* 85-1341, *et al.*, slip op. 3023 (2d Cir. May 2, 1986).

I. BACKGROUND

Salerno and Cafaro were arrested on March 21, 1986, and have been incarcerated since that date. They were charged, along with 13 others, in a 29-count indictment with one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982); one count of participating in a racketeering enterprise, in violation of 18 U.S.C. § 1962(c) (1982); 16 counts of mail fraud, in violation of 18 U.S.C. § 1341 (1982); one count of wire fraud, in violation of 18 U.S.C. § 1343 (1982); eight counts of extortion, in violation of 18 U.S.C. § 1951 (1982); and one count of operating an illegal bookmaking business and one count of operating an illegal numbers business, in violation of 18 U.S.C. § 1955 (1982). The RICO counts allege 35 specific acts of

racketeering activity, including the alleged mail and wire frauds, extortion, and gambling, and two conspiracies to commit murder.

A. *The Initial Decision by Judge Walker*

At the arraignment of Salerno and Cafaro before Judge John M. Walker, Jr., sitting as Part I Judge, the government moved for their pretrial detention pursuant to 18 U.S.C. § 3142(e). The government conceded that neither defendant posed a risk of flight, but it contended that no condition of bail or combination of conditions would assure the safety of the community or any person. After a three-day continuance at the request of the government, Judge Walker conducted an evidentiary hearing.

At the hearing, the government submitted to the court a lengthy and detailed proffer of evidence derived from court-ordered electronic surveillance at various locations and from the anticipated testimony of two of the government's trial witnesses. The proffer indicated that Salerno was the "boss" of the Genovese Crime Family of La Costra Nostra, that Cafaro was a "captain" in the Genovese Family, and that the two had participated in conspiracies to use violence in seeking to, *inter alia*, eliminate competition for their gambling operations, collect moneys in the course of their loansharking business, and control labor unions. The proffer also indicated that the expected testimony of the two witnesses, former high-ranking members of organized crime who had testified for the government at trials of other organized crime figures, would show Salerno's participation in conspiracies to murder two named individuals. Tapes of electronic surveillance also disclosed Salerno's approval of at least one other plan to commit murder.

Salerno, in opposition to the motion for detention, suggested that the government's key witnesses were subject to impeachment on the basis of their criminal pasts and their favorable cooperation agreements with the government, and he proffered the testimony of witnesses who, while denying knowledge relating to any of the allegations in the indictment, would state that they did not consider Salerno to be any danger to the community. Salerno also produced a letter from his doctor, who had attended him since 1977, stating that Salerno, age 74, has had a history of high blood pressure complicated by congestive heart failure since 1961 and that his condition has resulted in serious vascular damage which, despite a strict medical regimen, has progressed. The doctor noted also that in 1981 Salerno suffered a stroke from which he has recovered with some limited residual disability.

Cafaro presented no evidentiary material at the hearing. He relied on argument [*sic*] that the government's tape recordings of his threats of violence and counseling of others to use violence revealed at most "tough talk" and that the government had offered no proof that any of the violent acts discussed by him were actually carried out.

After the two-day hearing, the court granted the government's motion for detention in an Opinion and Order dated March 28, 1986 ("March 28 Order"), which apparently was not filed but was modified by an Opinion and Order filed on April 2, 1986 ("April 2 Opinion"). In the April 2 Opinion, the court reviewed in detail the government's proffer with respect to the defendants' use or threatened use of violence and concluded that the government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the

safety of the community or any person in the community. As to Salerno, the court noted, *inter alia*, that

> [t]he government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community.

[App., *infra*, 48a]. The court noted that the release conditions proposed by Salerno, which included so-called "house arrest" and an order not to commit crimes or intimidate witnesses, closely paralleled those found inadequate in *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985), and it concluded that Salerno should remain detained pending trial.

As to Cafaro, the court found that the government had "established by clear and convincing evidence that Cafaro was actually conducting the business of the enterprise and that he did so by directing others to commit violent acts." [App., *infra*, 55a]. The court concluded that the release conditions proposed by Cafaro, which were that he surrender his passport and not be allowed to go to specified restaurants, social clubs, and offices, or to associate with other defendants, would at most assure Cafaro's presence at trial but would in no way assure the safety of the community:

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even

> the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident.

[App., *infra*, 56a-57a]. The court stated that "this court cannot envision any set of conditions that could ensure the safety of the community from Cafaro." [*Id.* at 56a].

Accordingly, the court ordered that Salerno and Cafaro be committed to the custody of the Attorney General for confinement prior to trial. To the extent practicable, defendants were to be confined in a corrections facility separate from persons awaiting or serving sentences or being held in custody pending appeal, and were to be afforded reasonable opportunity for private consultation with their respective attorneys.

B. *The Decision by Judge Lowe*

While the government's motion was pending before Judge Walker as Part I judge, the present prosecution was assigned by lot to Judge Mary Johnson Lowe for trial. On April 1 defendants asked Judge Lowe to review the March 28 detention order announced by Judge Walker and thereafter made a more formal motion for review of both the March 28 Order and the final detention order embodied in the April 2 Opinon. Followng a hearing on April 11, Judge Lowe denied defendants' motion. She ruled that Judge Walker's findings were not subject to *de novo* review

and that there was no new evidence sufficient to warrant disturbing those rulings.

Defendants have filed notices of appeal seeking review of the orders of Judges Walker and Lowe.

C. *Issues on Appeal*

Defendants raise several issues on appeal. Salerno contends that the government's reliance on the fruits of electronic surveillance without giving him 10 days' notice violated the provisions of 18 U.S.C. § 2518(9) (1982). Both defendants contend that the evidence was insufficient under the standards set by 18 U.S.C. § 3142(f) to support the district court's findings, and that to the extent that § 3142(e) of the Bail Reform Act permits their pretrial detention solely on the ground that they are likely to commit further crimes against the community, the Act violates their right to due process. The government contends that to the extent that defendants seek review of Judge Walker's March 28 Order, the notices of appeal were not timely filed, and this Court thus lacks jurisdiction to review that order.

We conclude that Judge Walker's detention order is properly before us and we thus reject the government's jurisdictional argument. We also reject defendant's statutory contentions, but we find merit in their constitutional attack on § 3142(e) of the Bail Reform Act in the present circumstances.

II. JURISDICTION

The government challenges our jurisdiction to review Judge Walker's March 28 Order on the ground that defendants' notices of appeal were not filed until April 21, 1986. Rule 4(b) of the Federal Rules of Appellate Procedure provides that

> [i]n a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. . . . A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

Notwithstanding a welter of confusing dates, it appears that, given the sequence of events below, defendants' notices of appeal were timely filed.

First, although the notices of appeal list the March 28 Orders as among those of which review is sought, that order was never entered in the court's criminal docket. Instead, it apparently was superseded by the order dated April 2, 1986, which was embodied in the April 2 Opinion. The April 2 Opinion was entered in the criminal docket on April 7. Thus the 10-day appeal period began on April 7.

Second, although defendants' notices of appeal bear the typed and handwritten date April 21, 1986, and were not docketed until April 23, the notices are officially stamped as having been filed in the Southern District Clerk's Office on April 16, 1986. The docket entries also state that the notices of appeal were filed on April 16. Thus, it appears that the notices were filed within the 10-day period after the docketing of Judge Walker's final detention order. They are timely to give us jurisdiction to review that order.

III. STATUTORY ISSUES

Defendants contend that the detention order was entered in violation of various statutory provisions. We have considered all of defendant's statutory arguments and conclude that none of them has merit. Only two warrant discussion: (1) that the court

should have rejected the government's proffer against Salerno of an electronically intercepted conversation because the government had failed to provide him, in advance of the detention hearing, with certain surveillance information pursuant to 18 U.S.C. § 2518 (9); and (2) that the evidence was insufficient to support the court's finding pursuant to 18 U.S.C. § 3142 that they pose a danger to the community.

A. *The Intercepted Conversation*

Part of the government's proof against Salerno was its proffer of a recording of a conversation in a construction trailer in Edgewater, New Jersey, obtained through a court-ordered electronic surveillance ("Edgewater surveillance"). Section 2518(9) of Title 18 provides that

> [t]he contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Salerno argues that because the government failed to provide him with the Edgewater surveillance applica-

tion and order 10 days before the detention hearing, the court should have rejected the government's proffer of the contents of the intercepted conversation. We disagree.

Preliminarily, however, we note our disagreement with the government's primary argument as to why we should reject Salerno's contention. The government argues that § 2518(9) has no applicability to detention hearings under the Bail Reform Act because, in light of the Act's provision that such a hearing should be held not later than five days after a defendant's first appearance before a judicial officer, *see* 18 U.S.C. § 3142(f), compliance with § 2158(9) prior to such a hearing would be impossible. We think it clear that Congress intended § 2518(9) to apply to detention hearings and we do not find the two provisions irreconcilable. On its face, the language used by Congress—"any trial, hearing, or other proceeding in a Federal or State court"—plainly seems broad enough to include a hearing on a pretrial detention motion. Further, the legislative history of § 2518(9) states that the term " '[p]roceeding' is intended to include all adversary type hearings." S. Rep. No. 1097, 90th Cong., 2d Sess. 105, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2195 ("Senate Report"). We have no doubt that Congress views a detention hearing as an adversary type hearing. It provided in the Bail Reform Act that at such a hearing a defendant is entitled, *inter alia*, to be represented by counsel, to have counsel appointed for him if he is indigent, and to "be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." 18 U.S.C. § 3142(f). Thus we conclude

that Bail Reform Act detention hearings are proceedings to which § 2518(9) was intended to apply.

This intention is not vitiated by the fact that § 3142(f) schedules a defendant's initial detention hearing to be held before the 10-day period would normally expire. Appropriate means of coordinating the two sections to achieve the purposes of each are found in the terms of the sections themselves. Thus, § 2518(9) authorizes the judge to waive the 10-day period if he finds that it was not possible for the government to furnish the defendant with the required information so far in advance of the proceedings and that the defendant will not be prejudiced by the delay. And § 3142(f) allows the court, in scheduling the detention hearing, to grant a continuance of longer than the normal maximum length (five days on defendant's motion, three days on the government's motion) for good cause, which would presumably include prejudice to the defendant resulting from the government's inability to have provided him earlier with the surveillance order and application.

Nonetheless, we find no violation of § 2518(9) here. The purpose of that section's 10-day provision is "to afford the defendant 'an opportunity to make a pretrial motion to suppress . . . .'" *United States v. Melendez-Carrion*, slip op. at 3039 (quoting Senate Report at 105-06, 1968 U.S. Code Cong. & Ad. News at 2195). Such a motion may be made, however, only by an "aggrieved person," § 2518(10)(a), *i.e.*, "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed," § 2510(11). A person who was not named in the wiretap order and was not a party to any conversation intercepted during that tap is not an "aggrieved person" and may not

move to suppress information derived from it. *United States v. Fury*, 554 F.2d 522, 525-26 (2d Cir. 1977); *see Alderman v. United States*, 394 U.S. 165, 175 & n.9 (1969) ("aggrieved person" language adopted existing standing rule that Fourth Amendment rights may not be asserted vicariously).

As the district court found, Salerno was not named in the Edgewater surveillance order and was not a party to the intercepted conversation. Accordingly, he had no standing to seek its suppression and was not prejudiced by the government's inability to provide him with the surveillance application and order 10 days prior to the detention hearing.

B. *Sufficiency of the Evidence*

The Bail Reform Act authorizes detention pending trial where "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community. . . ." 18 U.S.C. § 3142 (e). The burden is on the government to prove that pretrial release of the defendant will pose a danger to any person or the community, and it must prove the facts underlying this contention by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

The district court's conclusion that the defendant poses a danger to the community, as well as its ultimate determination that only confinement will assure the safety of other persons and the community, normally must be upheld if not clearly erroneous. *United States v. Gotti*, No. 86-1230, slip op. 4325, 4334-36 & n.4, (2d Cir. June 25, 1986); *Melendez-Carrion*, slip op. at 3039; *Colombo*, 777 F.2d at 100. Where, as in this case, the future misconduct that is anticipated concerns violent criminal activity, no issue

arises concerning the outer limits of the meaning of "danger to the community," an issue that would require a legal interpretation of the applicable standards.

Within this framework we find no basis for overturning the district court's findings or conclusions. The evidence proffered by the government, as set forth above, amply supported the court's findings that the government had proven by clear and convincing evidence that Salerno "is a danger to the community as the 'Boss' of an organization that uses force, violence, and threats of force and violence to further its illegal operations," [App., *infra*, 48a], and that Cafaro "has directed violent acts and is ready, willing and able to direct violent acts in the future," [*id.* at 55a].

Nor do we see any error in the district court's application of the terms of the Bail Reform Act to the facts found and its conclusion that the conditions of release proposed by the defendants were inadequate to prevent defendants from resuming the conduct of "business as usual." The conditions proposed by Salerno were not significantly different from those this Court found inadequate in *United States v. Colombo*, 777 F.2d 96; and the conditions proposed by Cafaro would have been substantially less effective.

We conclude that the detention order did not violate the Bail Reform Act.

IV. THE CONSTITUTIONAL ISSUE

Defendants' principal constitutional contention is that the Bail Reform Act violates due process insofar as § 3142(e) permits pretrial detention of a defendant on the ground that his release would pose a danger to the community or any person. We agree. The government makes no claim that pretrial detention may be upheld as a punishment. Detention could

not be imposed as punishment in the absence of an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979). Instead the government contends that pretrial detention on the ground of dangerousness may be constitutionally imposed as a regulatory measure to protect public safety. In *United States v. Melendez-Carrion*, a majority of the panel held § 3142 (e) unconstitutional as applied to two defendants detained before trial for a period in excess of eight months on the ground of danger to the community. The panel majority was internally divided, however, with Judge Newman holding that danger to the community may not constitutionally justify pretrial detention as a regulatory measure and Chief Judge Feinberg holding that such detention had become unconstitutional punishment because of the length of the detention that had occurred. In the present case, a majority of the panel is in agreement that the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention.

At the outset we note that the present detention order does not hinge on risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process. The government conceded at the detention hearing that there was no risk that the defendants would flee and not appear for trial. Nor was there any finding by the court that the defendants were likely to tamper with or intimidate witnesses or jurors, or otherwise to jeopardize the trial process. We recognize that pretrial detention may be validly imposed when substantial evidence indicates that a defendant, if released, would commit such acts. *See Melendez-Carrion*, slip op. at 3057-58 (Newman,

J.) ("Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law."); *cf. United States v. Gotti* (defendant's release may be revoked pursuant to § 3148 of the Act if it is established by a preponderance of the evidence that no conditions of release would likely prevent defendant's intimidation of witnesses).

The sole bases for the detention order in this case are the findings that the defendants would, if released, carry on "business as usual" notwithstanding any release conditions, and that business as usual involves threats and crimes of violence. [App., *infra*, 48a, 56a-57a]. We regard § 3142(e)'s authorization of pretrial detention on this ground as repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes. As Judge Newman elaborated in *Melendez-Carrion*:

> The Government contends that section 3142(e) is to be upheld simply because preventive detention is a rational means of advancing the compelling state interest in public safety. That cannot be the test for determining the constitutionality of preventive detention. The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state

interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial government interest.

Incarcerating dangerous persons not accused of any crime would exceed due process limits not simply for lack of procedural protections. Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.* This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause—indeed, by all of the criminal justice guarantees of the Bill of Rights —is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The*

> *Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.*
>
> . . . As a matter of probabilities, a person lawfully arrested may pose a greater danger than someone not arrested but only suspected of dangerousness, but is very likely less of a risk to the community than many who have been convicted, sentenced, and released from confinement after expiration of their sentences. Just as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, it would equally bar preventive detention of a person who has been convicted of past crimes and has served his sentence. The Clause must accord similar protection to a person not convicted but only accused of a crime. Moreover, if the arrest is thought to reflect that the person is more deserving of confinement than members of the public not accused of crime, the confinement would offend the procedural component of due process by dispensing with the procedural guarantees of the Fifth and Sixth Amendments that must be observed before past conduct may justify incarceration on grounds of dangerousness.

Slip op. at 3054-56 (Newman, *J.*) (emphasis added; footnote omitted).

In sum, if a person is not charged with a crime, he may not, consistent with principles of due process, be incarcerated simply on the ground that he is likely

to commit a crime. The lodging of charges for alleged past crimes does not alter this concept of due process. The proper remedy for charges of past crimes, assuming they are proven, is payment of the penalty provided by law for those crimes, and we note that a person who has paid this penalty stands in a similar position, vis-a-vis the Bail Reform Act, to one who has not been charged with a crime. Notwithstanding the rehabilitative aspirations of criminal sentencing, however, it must be recognized that there is a substantial amount of recidivism by those who have served their sentences. Yet, once a person has paid the penalty for crimes of which he has been found guilty, he may not be further incarcerated to protect the public. Thus, even the probability that a convicted criminal will again engage in crime does not sanction his incarceration simply in anticipation of such future crimes. His incarceration as a regulatory measure would be barred, not by the Double Jeopardy Clause, which does not apply to nonpunitive measures, *see Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938), but by the substantive component of the Due Process Clause.

To uphold § 3142(e)'s provision for pretrial detention on the ground that defendants charged with violent criminal activities will continue "business as usual" would, therefore, create the anomaly that a person who has been charged with crimes but not yet convicted may be incarcerated on the ground that he will commit crimes in the future, whereas persons who have been neither charged with nor convicted of crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

We reject the government's contention that the fact of arrest, even for serious crimes, justifies detention

of the defendants as a regulatory measure simply because they are likely to continue their criminal activities. As stated in Judge Newman's opinion in *Melendez-Carrion*,

> [t]here can be no doubt that an arrest permits some regulatory curtailment of liberty. Even before probable cause has been found by a neutral magistrate, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). In addition, a seizure "reasonable" under the Fourth Amendment permits detention until a determination of probable cause by a judicial officer "promptly after arrest." *Id.* at 125. Furthermore, the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place. Procedures may therefore be used both to secure the defendant's presence at trial and to prevent the defendant from aborting the trial by intimidating witnesses or physically harming them. . . . Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law.
>
> Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against

> the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is unconstitutional not because preventing crime is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.
>
> Permitting an arrested person thought to be dangerous to remain at liberty unquestionably incurs a risk. The prediction of dangerous conduct, however difficult to make and however unreliable, will undoubtedly be correct in some instances. But all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished [on the sole ground that] government prefers that a risk not be taken.

Slip op. at 3056-59 (Newman, *J.*) (footnotes omitted). Even the risk of some serious crime, such as destruction of an airliner, as adverted to in Chief Judge Feinberg's dissenting opinion, *post*, must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration simply because untested evidence indicates probable cause to believe he has committed one crime and is a risk to commit another one. Surveillance would doubtless be the government's response if confidential information, not

disclosable to obtain an indictment, alerted the government to such a risk by a person not charged with a crime. It should be no less effective in cases where an indictment has been returned, even assuming, which is unlikely, that a person posing such a risk would not be detained despite a well-grounded fear that he would flee.

We do not believe that *Gerstein v. Pugh*, 420 U.S. 103 (1975), upholds pretrial detention to guard against the commission of future crimes. The detention there allowed, upon a policeman's assessment of probable cause, was for the purpose of taking "the administrative steps incident to arrest." *Id.* at 114. The Court's statement that the defendant will not escape "or commit future crimes" during that brief period of detention was not said to provide a reason for continuing the detention; rather it was said to show that there was no reason for dispensing with the requirement that the police submit their evidence of probable cause to a neutral magistrate. *Id.* It would be somewhat ironic if a decision rendered to assure a suspect the protection of a neutral magistrate's determination of probable cause after "a brief period of detention to take the administrative steps incident to arrest" became the basis for extending that detention for weeks and months after the probable cause determination has been made.

Nor do we believe that the Supreme Court's decision in *Schall v. Martin*, 467 U.S. 253 (1984), upholding brief preventive detention of juveniles, disposes of the due process objection to preventive detention of adults. Though the governmental interest in protecting the public is obviously of a high order whether the danger is posed by juveniles or adults, the Court in *Schall* was at pains to point out that juveniles, who "unlike adults, are always in some

form of custody," *id.* at 265, have an interest in liberty less substantial than that of adults, an interest that "may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.'" *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

We have considered the opinions of other appellate courts that have upheld the constitutionality of pretrial detention on the ground of dangerousness and we disagree with them for the reasons stated by Judge Newman in *Melendez-Carrion*. *See* slip op. at 3060-61 (Newman, *J.*). Nor do we believe that the decision of the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), authorizes the abandonment of the fundamental principle that detention simply to deter the commission of crime can properly occur only after conviction.

We emphasize again that there has been no finding in the present case that defendants pose a danger to witnesses or to the judicial process. The finding is that they will, if released, conduct business as usual. For the reasons above, we conclude that to the extent that § 3142(e) of the Bail Reform Act authorizes detention on this ground, it is unconstitutional.

CONCLUSION

The orders appealed from are vacated, and the matter is remanded to the district court for the setting of conditions of bail. All members of the panel are in agreement that the mandate is hereby stayed until the mandate of this Court is issued in *United States v. Melendez-Carrion*.

FEINBERG, Chief Judge, dissenting:

In this case, we confront the question whether the government may detain a dangerous defendant before trial in order to protect society. The majority believes that the Due Process Clause of the Fifth Amendment prevents the government from detaining such a defendant for that reason for even a brief period of time—presumably even for a day. As will be seen below, I disagree. I believe that pretrial detention for dangerousness does not violate the Due Process Clause when there is clear and convincing proof that a person already under indictment for a serious crime would commit another crime if released, if the detention has not continued so long as to constitute punishment. I would affirm the judgment of the district court, and I respectfully dissent from that portion of the majority opinion that holds the Bail Reform Act unconstitutional.

I. Is the Bail Reform Act Facially Consistent With Substantive Due Process?

The Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., permits the government to move before trial for the detention of a defendant indicted for the serious crimes with which appellants are charged, on the grounds that the defendant poses a threat to the safety of the community. 18 U.S.C. § 3142(f). Following a hearing, the judicial officer must order the detention if the officer finds that no conditions of release short of confinement will avert this threat. 18 U.S.C. § 3142(e).

We recently considered this aspect of the Bail Reform Act in United States v. Melendez-Carrion, No. 85-1431, slip op. 3023 (2d Cir. May 2, 1986). As both Judge Newman's opinion and my concurring

opinion in that case point out, slip op. at 3048-49, 3066-67, this statutory scheme has serious constitutional implications. Mentally competent adults not convicted of crime obviously have a substantial liberty interest in remaining free of confinement. Pretrial detention for dangerousness curtails that interest in an untraditional manner. But the novelty of the statute does not determine its lawfulness on its face. Rather, the relevant question is whether detention for a brief period to prevent future crimes while on release comports with the fundamental fairness demanded by the substantive component of the Due Process Clause.

Congress enacted the preventive detention provisions of the Bail Reform Act out of a deep concern about "the growing problem of crimes committed by persons on release." S. Rep. No. 225, 98th Cong., 2d Sess. 6 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News at 3188-89; see United States v. Rodriguez, No. 85-1323, slip op. 4173, 4178-80 (2d Cir. June 19, 1986). Congress concluded that, at least as to "a small but identifiable group of particularly dangerous defendants," the pressing need to protect the community called for confinement before trial. Senate Report, supra, at 6-7. In Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979), the Supreme Court reserved the question whether such an objective could constitutionally justify pretrial detention. In Schall v. Martin, 467 U.S. 253 (1984), the Court settled the issue with respect to juvenile detainees. The Court rejected a due process challenge to New York's scheme of detaining for a period generally not exceeding 17 days juveniles charged with crime in order to prevent them from committing crimes while on release. The Court held that the system was compatible with substantive due process because detention based

on dangerousness served a "legitimate and compelling" goal and did not amount to "punishment." Id. at 264-75.

It is true that *Schall* concerned detention of juveniles, whose liberty interest in freedom from confinement while charges are pending against them may be inferior to that of adults in a similar position. Id. at 265. However, the societal interest identified as "compelling" by the Court only two years ago in *Schall* does not vary in strength with the age of the person to be detained. If anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses. Accordingly, the government has advanced a legitimate and compelling reason for pretrial confinement of adults accused of crime. In light of this reason it is not surprising that other circuit courts that have considered the issue have held this aspect of the Bail Reform Act constitutional on its face. United States v. Portes, 786 F.2d 758 (7th Cir. 1986); United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986); see also United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc) upholding preventive detention under District of Columbia bail statute), cert. denied, 455 U.S. 1022 (1982).

This does not, however, end the due process inquiry. Since the Bail Reform Act curtails a defendant's precious interest in liberty, the Due Process Clause requires heightened scrutiny of the statutory means used to affect such curtailment. Under 18 U.S.C. § 3142(e), the judicial officer may order a person confined for dangerousness only after a finding that no conditions of release will assure the safety of the community. Under the statute, detention is

meant to be a sparingly dispensed remedy of last resort, used only when needed to protect society in cases where there is proof that less drastic measures would fail. Nor do appellants make any persuasive claim that the statutory procedures required as prerequisites to a finding of dangerousness are unfair or provide insufficient "protection against erroneous and unnecessary deprivations of liberty." Schall v. Martin, supra, 467 U.S. at 274.

Due process also dictates that the government not pursue its goals through "conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952). It is not necessary to be enthusiastic about comparatively brief pretrial detention of accused persons on the basis of predicted future crimes to acknowledge that the practice does not violate that norm. It may be that such predictions are less than scientific, and that it is difficult to assess whether the verifiable gains in reducing crime justify the curtailment of liberty that results. But that assessment is for the legislature, not for us, to make, so long as there is no constitutional violation. There is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement. When a person has been convicted of crime, judges legitimately rely on such predictions in setting the length of a prison sentence. Identical considerations shape the decision whether to grant bail to a convicted person pending appeal. Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); United States v. Anderson, 670 F.2d 328 (D.C. Cir. 1982) (per curiam); United States v. Provenzano, 605 F.2d 85 (2d Cir. 1979). In both situations, a judge's informed assessment of a person's dangerousness may increase the length of time that the person is incarcerated. The law also acknowledges that a

person arrested for crime may be summarily detained for a short while before coming before a magistrate not only to prevent flight or danger to the judicial process, but also to bar commission of future crimes. Cf. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (once suspect is in custody "there no longer is any danger that suspect will escape or commit further crimes" while police submit evidence to magistrate). If the police may detain an arrestee for a short time to prevent danger to the community pending a finding of probable cause, Congress may direct judges to do the same after an indictment and pending trial.

There is no doubt, as the majority points out, that putting someone in jail simply because he is thought to be dangerous is not part of our tradition of liberty. But the issue is not as stark or as simple as that. Under the Bail Reform Act, a number of limitations come into play before a person can be confined. First, the person must be charged with a crime, and not just any crime, but a serious crime as specified in the statute. Second, the government must persuade a judicial officer by clear and convincing evidence that the defendant is a danger to the community. Third, the government must also persuade the judicial officer by the same standard of proof that no condition of release will deter the defendant from committing a crime while at liberty. Fourth, the detention is meant to be of limited duration—until it can be determined whether the defendant is guilty of the crime charged. So the constitutional issue before us is not simply whether an individual can be confined because he is dangerous. It is whether a defendant already indicted for a serious crime can be denied bail in the pretrial period because there is clear and convincing evidence that the defendant will otherwise commit another crime while on release. So stated, the pro-

position still raises grave constitutional issues but the answer to them is not easy. For example, if a member of a terrorist organization is indicted for blowing up an airliner for political reasons and there is clear and persuasive evidence that the defendant will do so again if not confined, it is not self-evident to me that society must nevertheless immediately release him on bail until he is tried.

The majority sees an "anomaly" in holding the Bail Reform Act constitutional because

> a person who has been charged with crimes of violence but not yet convicted may be incarcerated on the ground that he will commit crimes of violence in the future, whereas persons who have been neither charged with nor convicted of violent crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

I see no anomaly. The Bail Reform Act applies only to persons indicted for serious offenses, not to unaccused citizens plucked from the population at large. Indictment basically alters the due process inquiry by establishing probable cause to believe that the accused has committed specific acts constituting a serious crime. That legal finding gives the government a concrete basis, not available as to persons not accused, for predicting that the person will commit another crime before trial.[1] In other contexts, probable cause is also sufficient to permit significant re-

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[1] Also inapposite is the analogy to those who have served sentences for past offenses but have not been again indicted. Double jeopardy considerations apply to them. In addition, a principal rationale for sending convicted offenders to prison is that their sentence will rehabilitate them and deter them from future misconduct. Neither consideration applies to those not yet convicted of a crime.

straints on liberty. See Gerstein v. Pugh, supra, 420 U.S. at 118-20 (detention of arrested person pending further proceedings); Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972) (detention of parolee pending final decision whether to revoke parole). Moreover, as noted above, the Bail Reform Act has a built-in limit on the length of the period for which an accused person may be detained. The end of that period coincides with the disposition of the underlying criminal charge against the defendant, whether by plea or by trial. While undue pretrial delay may further affect the due process equation, see Part II below, detention under the Bail Reform Act is meant to be limited to preserving the status quo, as far as the community is concerned, pending the resolution of specific legal charges.

For these reasons, I conclude that detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause.

II. Does the Statute as Applied Comport with Due Process?

Up to this point, I have considered whether the Bail Reform Act is unconstitutional on its face. The conclusion that it is not does not determine whether the statute as applied comports with due process. The government's powers of preventive detention in a given case are not limitless. Every other appellate court that has examined the lawfulness of this practice under the Bail Reform Act has indicated that

pretrial detention to prevent future crimes may be invalid if unduly prolonged. Portes, supra, 786 F.2d at 768 & n.14; Accetturo, supra, 783 F.2d at 388; see also United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986); cf. United States v. Edwards, supra, 430 A.2d at 1333 (stressing 60-day time limit of D.C. preventive detention scheme determined to be constitutional). This reflects widespread agreement that the passage of time can tip the scales of the balance mandated by due process.

To put the proposition another way, even legitimate and compelling objectives cannot justify detaining a person indefinitely before trial. At some point in time, the harsh burdens of extended confinement will exceed the bounds of due process. As I stated in my concurring opinion in *Melendez-Carrion*, slip op. at 3068-73, lengthy pretrial incarceration can run afoul of the rule that the government may not punish a person not convicted of crime. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Whether a measure is punitive in nature depends both on whether the action is imposed for the purpose of punishment and whether it is excessive in relation to the legitimate, nonpunitive aims assigned to it. Schall, supra, 467 U.S. at 269; Bell v. Wolfish, supra, 441 U.S. at 538-39.

In *Melendez-Carrion*, Judge Newman and I were willing to assume that Congress did not intend preventive detention under the Bail Reform Act to be a punitive measure. However, the second branch of the due process inquiry demands that confinement before trial not be excessive in relation to the statute's goals. Accordingly, undue prolongation of detention before trial can transform what is initially a valid regulatory measure into punishment pro-

hibited by the Due Process Clause. That is so because the traditional test for distinguishing regulatory from penal measures set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), and reaffirmed in Bell v. Wolfish, supra, looks to whether a measure "involves an affirmative disability or restraint" and whether "it has historically been regarded as a punishment." Detention before trial undoubtedly imposes a major disability and restraint on the defendant. As I explained in *Melendez-Carrion*, detention for a long period of time founded on a person's danger to the community is also so harsh that it comes to resemble a traditional prison sentence. Since none of the traditionally "regulatory" reasons for jailing a person without trial, such as the defendant's propensity to flee or to tamper with witnesses, justify confinement in such a case, such lengthy detention would historically be seen as a punishment. Accordingly, unduly extended incarceration for general dangerousness of persons never convicted of any crime can cross the line separating a valid regulatory measure from punishment imposed in violation of the Due Process Clause. Melendez-Carrion, supra, slip op. at 3071-73.

In *Melendez-Carrion*, I took the position that the length of preventive detention requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement. Here, Salerno and Cafaro have been detained for dangerousness for a little over three months. Arguably, time alone should not always determine whether a given instance of detention for dangerousness has become punitive. Though length of time may be the best measure of the impact of incarceration on a person accused of crime, perhaps

due process judgments should take into account the reasons for pretrial delay in unusual circumstances. Relevant factors might include the complexity of pretrial preparations for the underlying case, and whether the defendant or the government has added needlessly to that complexity or has egregiously delayed the proceedings. See Accetturo, supra, 783 F.2d at 388. I cannot conclude on this record that the restriction on appellants' liberty has degenerated into punishment. Were we to affirm, I would not foreclose appellants from renewing their constitutional claims at a later date.[2] But at this point, there is no constitutional basis on which to set aside Salerno's and Cafaro's detention. We should affirm. I respectfully dissent.

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[2] Pretrial detention under any circumstances is an extraordinary remedy with serious due process implications. If the government seeks the benefit of that remedy it must exert itself to accelerate the date for a trial. Quite often, reliance on the usual processes of trial administration will not be enough. If this is so, the government must take whatever special steps are needed to move the trial date forward. In complex multi-defendant cases, that may require that the government seek a severance. In cases involving many hours of taped intercepted material, the government may have to arrange for swift and reliable transcription, by extraordinary means if necessary, before moving for detention or immediately after obtaining it. Should the government be unwilling or unable to shoulder the cost of these procedures, pretrial detention may not be available.

The Speedy Trial Act, 18 U.S.C. § 3164, does mandate that cases involving detained persons be given priority. On June 4, the trial judge apparently set a date shortly after October 1, 1986 for submission of pretrial motions in this case. Such a leisurely pace in a criminal case involving pretrial detention is difficult to justify.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Cr. 245 (MJL)

UNITED STATES OF AMERICA

—against—

ANTHONY SALERNO, a/k/a "Fat Tony,"
VINCENT CAFARO, a/k/a "Fish,"
VINCENT DiNAPOLI, a/k/a "Vinnie,"
LOUIS DiNAPOLI, a/k/a "Louie,"
GIUSEPPE SABATO, a/k/a "Pepe,"
CARMINE DELLA CAVA, a/k/a "Carmine,"
THOMAS CAFARO, a/k/a "Tommy,"
JOHN TRONOLONE, a/k/a "Peanuts,"
MILTON ROCKMAN, a/k/a "Maishe,"
NICHOLAS AULETTA, a/k/a "Nick,"
EDWARD J. HALLORAN, a/k/a "Biff,"
ALVIN O. CHATTIN, a/k/a "Al,"
RICHARD COSTA, a/k/a "Richie,"
ALPHONSE MOSCA, a/k/a "Funzi," and
NEIL MIGLIORE, a/k/a "Neil," DEFENDANTS

[Apr. 2, 1986]

OPINION AND ORDER

WALKER, DISTRICT JUDGE:

The government has moved pursuant to the Bail Reform Act of 1984, 18 U.S.C. section 3142(f)(1)(A), "in a case . . . that involves . . . a crime of

violence" for pretrial detention of defendants Anthony Salerno and Vincent Cafaro, who, with thirteen other defendants, are named in indictment 86 Cr. 235 (MJL) filed on March 20, 1986, and unsealed on March 21, 1986. The government concedes that neither defendant poses a risk of flight but urges strenuously that no condition of bail or combination of conditions will assure the safety of the community or of any person and that therefore pretrial detention is mandated under 18 U.S.C. section 3142(e). For the reasons set forth below, this court finds that the government has established by clear and convincing evidence that both defendants pose a present danger to the community and that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.

On March 21, 1986, both defendants appeared for the first time before this court, sitting in Part I. Both defendants moved for a 5-day continuance as provided in 18 U.S.C. section 3142(f), and this court set the hearing for March 26, 1986. The hearing was held on March 26 and 27, 1986.[1] The information received from both sides was by way of proffer as permitted by *United States v. Martir*, No. 86-1005, slip op. (2d Cir. Feb. 3, 1986).

The 88-page indictment charges that the fifteen defendants were leaders, members, and associates of the "Genovese Organized Crime Family of La Cosa Nostra (The Genovese Family)," that the Genovese

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[1] On March 27, 1986, the case was assigned by lot to Judge Lowe pursuant to Rule 8 of the Local Rules for the Division of Business Among District Judges. With Judge Lowe's consent, this court completed the hearing and is entering the within findings and conclusions.

Family was an "enterprise" as defined in 18 U.S.C. section 1961(4), and that the purposes of the enterprise included the unlawful infiltration in New York City of legitimate businesses in the concrete construction, food manufacturing, and food distribution industries, exercise of control over unions in these and other industries, operation of illegal gambling businesses, loansharking, murder and conspiracies to murder those who would threaten the enterprise, engendering fear of the enterprise through violence and concealment of the existence of the enterprise from law enforcement authority.

The indictment charges that the means and methods of the enterprise included the maintenance of a hierarchial "organized criminal group" operating in New York and other states. The enterprise operated through "crews" made up of "members" and "associates" and led by a Captain, or "Capo." In charge of the several "crews" and their "capos" was on overall "Boss" and, at times, an "Underboss." When a "Boss" was incapacitated or imprisoned, one of the "Capos" in the Genovese Family served as "Acting Boss." The "Bosses" and "Capos" supervised and protected the criminal activities of the enterprise's members and associates. The indictment charges that Anthony Salerno is the present 'Boss" of the Genovese Family and has served in the past as its "Acting Boss" and "Consigliere" and that Vincent Cafaro is a "Capo" in the Genovese Family.

The indictment delineates the roles of all defendants in the Genovese Family hierarchy and in its criminal racketeering activities of bid-rigging in the concrete construction industry, extortion, loansharking, labor racketeering, gambling, and the use of violence. The defendants are charged both with con-

spiracy to participate in the above racketeering enterprise and actual participation in the enterprise in violation of 18 U.S.C. section 1962. The indictment further charges sixteen counts of mail fraud, under 18 U.S.C. sections 1341 and 1342, in connection with the bid-rigging scheme in the concrete construction industry whereby the enterprise rigged subcontract bids valued variously in the range of $3,000,000 to $13,000,000 in major building projects in New York City. The indictment further alleges an 18 U.S.C. section 1343 wire fraud count relating to the election and control of Roy L. Williams as President of the Teamsters International; a conspiracy to extort payments from a food distributor, Marathon enterprises, seven extortion counts relating to Marathon's distribution arrangements with legitimate retailers, and a conspiracy to extort payments from one Anthony Giordano, all in violation of 18 U.S.C. sections 1951 and 1952; one count of illegal numbers in violation of 18 U.S.C. section 1955 and one count of illegal bookmaking, both in violation of 18 U.S.C. section 1955 [*sic*].

A principal thrust of the indictment is that the power and effectiveness of the Genovese Family to carry out its criminal activities depends on its ability and willingness to use violence and its reputation for violence. Violence is alleged as a method and means of the racketeering enterprise and the specific racketeering acts alleged include not only the foregoing extortion counts, but two murder conspiracies as well.

FACTS

The government's proffer in support of detention consisted of the prospective testimony of two witnesses who had previously testified in organized

crime trials, James Fratianno and Angelo Lonardo, evidence from a search conducted at the apartment at 115th Street and First Avenue, the full-time residence of Cafaro and the in-town residence of Salerno, as well as excerpts from electronic surveillance in two locations in Manhattan from which Genovese Family business was conducted—the Palma Boys Social Club and the Social Club at 2244 First Avenue —and one location in a trailer in Edgewood, New Jersey.[2] The proffers related primarily to conspiracies to murder, and labor loansharking, and gambling violence.

Conspiracy to Murder

The government proffered that Fratianno would testify, as he had in a previous trial, that in 1976 he attended a meeting in a back room of a store in which members of Genovese Family including Salerno were present. Those assembled decided to murder John Spencer Ullo, a person engaged in loansharking for the Genovese Family. There was a vote taken and, Fratianno testified that "Gigante said 'I vote to hit,'

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[2] The government relied upon the Edgewater surveillance in its proffer against Salerno in connection with a conspiracy to murder and extort Andrew Giordano in 1984. Salerno argued that 18 U.S.C. section 2518(9) was violated since he was not given ten-days notice of its use at the hearing. Whether that ten-day notice requirement applies at a pretrial detention hearing is open to question given the five day limitation on 18 U.S.C. section 3142(f) continuances. The court has received this proffer on the government's representation that Salerno lacks standing to move to suppress the Edgewater surveillance and thus is not prejudiced by the government's non-compliance with the ten day requirement. The validity of the two Manhattan surveillances has been fully litigated in other proceedings and is not objected to by either Salerno or Cafaro.

Tieri said 'Hit,' Salerno said 'Hit,' and it went around the table in a unanimous fashion." The "contract" was not carried out when Ullo got wind of the plan in California and was himself able to kill the hitman. The government proffered that it would corroborate Ullo's role in the Genovese Family, that Ullo feared certain individuals in the family and took steps to protect himself once he learned that the individual in California was out to kill him. T. 13-15. The trial at which Fratianno testified resulted in the conviction of Tieri.

The government proffered that according to another prospective witness, Angelo Lonardo, Salerno and the Genovese Family issued a "contract" in 1980 to kill John Simone who was also known as Johnny Keyes. The "contract" arose out of the murder of Angelo Bruno, the former head of the LCN family in Philadelphia. Salerno contacted one John Tronolone and asked him to pass out the word that there was a "contract" on the life of Johnny Keyes and others. While in Florida, Tronolone told Lonardo that if Keyes shows up then the "contract" should be fulfilled. Lonardo at the time was the head of the Cleveland LCN family that reported to the Genovese Family in New York and Tronolone was its "consigliere" who, in effect reported to two bosses, Salerno and Lonardo. Johnny "Keyes" Simone asked Tronolone for his assistance in settling the matter. However, Tronolone lied to Keyes in saying that he would try to settle his dispute with Salerno. Tronolone told Lonardo that instead he would go to New York to see Salerno to set Keyes up. After speaking to Salerno, Tronolone told Lonardo that he would now tell Keyes to travel to New York and that everything was okay. Keyes went to New York to see Salerno

and was killed with three bullets in the head. Later Tronolone explained to Lonardo that he had set Keyes up. T. 16-18.

Lonardo will also testify that two individuals, John Nardi and Danny Green in the Cleveland LCN were killed in 1977. Prior to the murders, Lonardo and Jack Licavoli of the Cleveland Family came to New York to explain the problem to Salerno and Philip Lombardo, alias Benny Squint, who was at that time the "Boss" of the Genovese Family. Licavoli and Lonardo asked Salerno and Lombardo to request Castellano to carry out the "contract" on Green and Nardi if they appeared in New York to meet with him. Both Salerno and Lombardo approved the "contract" and agreed to do so. Before the "contract" could be fulfilled in New York, Nardi and Green were killed elsewhere in car bombing incidents. T. 18-24.

In another murder conspiracy, one Milton Parness requested permission of Salerno to kill Anthony Giordano, a debtor to Parness' extortion operations. Parness is overheard on surveillance in January 1985 telling an associate that Salerno responded to Parness' inquiry "Do we kill him and get it over with?" by replying "If you want to kill him, we will kill him." T. 24-29.

In addition to witness testimony indicating that Salerno is presently the Genovese Family "Boss," the government proffered an intercept of Salerno in 1984 on an occasion when Salerno describes how he would deal with someone who owes money to him. Salerno says that if the person asks him who he is, he will say: "What am I? I'm the f-----g boss." T. 30.

In an intercept in February, 1984, Vincent Cafaro, his son Thomas Cafaro, and a third individual are overheard discussing an Uzi machine gun in their

possession at 2244 First Avenue. Cafaro says he knows about these sorts of weapons because "I got the same thing upstairs." T. 31-32. In February, 1985, a search executed in the 115th Street apartment shared by Salerno and Cafaro yielded a .25 caliber automatic weapon together with an empty clip and seven live rounds of ammunition. Cafaro admitted at the time that the weapon was his. T. 33.

Labor Violence

In early 1984, a conversation between Salerno, Christopher Fennari and Vincent Cafaro was intercepted relating to who was to take control of the local carpenters' union. Salerno explains to Cafaro a prior incident with the carpenters: "[W]e sent a couple of kids after the carpenters. This is a good two years ago. They gave them a beating." T. 34.

In another conversation in early 1984, Cafaro is told by another person that his son was involved in a bar fight and later told a woman and a man in the bar, if asked about the fight, to "mind their own business." Afterwards, the person received a phone call from somebody claiming to know "Fish," Cafaro's alias, and wanting to know why his son spoke to his daughter that way. Upset at this unauthorized use of his name, Cafaro tells the man to tell the phone caller: "Just say: 'Fish' said if you ever mention this name again or this guy's name again, he is going to come over here personally and break your f------g legs." T. 34-36.

Loansharking and Extortion Violence

In January 1984, Cafaro's son Thomas explains to his father that an associate, "Crazy Tom", was asking another person for $2,500 owed to him. When

Thomas Cafaro states that Crazy Tom started yelling at the kid, Vincent Cafaro interjected "Why didn't he give him a f-----g beating?" Later in the conversation, Cafaro, referring to the debt, says that to collect the money he should tell him "I will break your f-----g ass. Give me my money. If you ain't got my money in a week, I am going to break your f-----g ass, that's all." He later tells his son that he better tell Crazy Tom that this fellow better not come by the club because he would then have to get Crazy Tom to "break the f-----g kid's head." T. 37-39.

In another conversation in early 1984, Vincent Cafaro speaks to an associate about a debt owed to him by one, Ralph. Cafaro states "I was going to give him a f-----g beating like when Richie was here. If I had him, I'm going to break his mother f-----g legs." Later on in a conversation, Cafaro relates "I had an incident with him; going down there, threaten the f-----g, knock his f-----g brains in. We got to prove it, I threatened to get the money." His associate replies "You had to get $500 a week. It was his job, he gives you the first couple of payments. After that, what happens? He cries." T. 40.

In a conversation in early 1984 between Cafaro and one "Pete," Cafaro states that he told Frankie Salerno to "get a hold of this kid [that owes him money] and bring him to me. He wants to be a wise guy. He told the guy he wants to bet from a thousand to $2500 and he thinks he ain't going to pay? I'll knock his f-----g brains in." Later on, Pete tells Cafaro: "I put up with him Fish. I came and I gave him a beating." Cafaro replies: "Good he deserves it." Pete says: "I gave him a beating. He was full of blood. His f-----g face was all marked. Every f-----g shot I gave him, he had a lump like this, cuts here,

cuts there; ah, I, he ain't got no face." Cafaro replies: "Yeah, you banged him up good, f--k him." T. 41.

In a conversation in March 1984, Salerno tells two others about an individual to whom Salerno had lent $150,000. When Salerno learns that the money is not being used for its intended purpose, he tells his listeners what he told the borrower "I told him, I says, what did I give you that money for? I said, I didn't give you the $150,000 to straighten everybody out, you c--------r. If you don't bring me that money Saturday . . . I know he could give me the money now if he has got it, he has to get it out of all these big shots. . . . I says I will kill you right in f----g, you c--------r. And I walked out." T. 42.

Gambling Violence

The government proffered numerous conversations relating to the problems that Cafaro and Salerno had with regard to outside competitors of the Genovese family numbers business and, in particular, violation of the "two-block rule" whereby a competitor was not permitted within two blocks of a Genovese Family numbers store. In a conversation in early 1984, after Cafaro is told about a new store violating the two-block rule, he says: "Alright give me the address and I'll send these kids. I'll send these kids right up there. They will take the joint and put it all in the street. They don't want the f--ks. Knock the f-----g joints right out. These kids here, these Cuban kids I got around me, they are good kids. I used them against the Jews the way I used Blood [an enforcer for the Genovese gambling operation] against the niggers. You understand when there is a beef with

a nigger, don't worry, Frankie, I'll handle it." T. 43, 44.

In a conversation in January 1984, Cafaro tells one "Artie," who appears to have a role in the Genovese gambling operations, of a dispute with the owner of a new competing gambling store in violation of the two-block rule, Cafaro said: "You are not opening that store." He said: "Well, I am open already. I am going to stay there." "Good, I says, fine." Cafaro goes on: "Now, I says, tomorrow I'm giving you fair warning. I am coming there personally, and if this joint is open, f-----g joint is going to go in the street and there's going to be a blood bath in there with your f-----g body. I tried to be nice to you, I say, but I could see you want to go the other way. Fine, I got up and I said, 'come on, get out.' And he says: 'Wait a minute, can I talk?' 'There is nothing to talk about. You spoke, and you said what you had to say and that's it.' " T. 44-45.

In another conversation in June 1984, Vincent Cafaro tells one "Freddie," also involved in Genovese gambling operation [*sic*] about a numbers store Cafaro wants broken up. And he tells Freddie "Get hold of Blood, and tell Blood to send his guys into the store." "Break it up and put locks on the door, and whoever is in there, knock their f-----g brains out." Cafaro later says: "That's what those guys are paid for." T. 45.

In another conversation in March 1984, Cafaro tells "Artie" about another store in violation of the two-block rule. He gives Artie directions to get there and tells him "I want you to go there and frighten people." T. 45 .

In a conversation in April 1984, Cafaro reports to Salerno about one "Bobby" controlled by "Buddy"

who has opened up a numbers store across the street from one of theirs. Cafaro tells Salerno that they said that "They don't believe that the store across the street belongs to us, that I should go see Buddy." Cafaro says: "I'm going to tell Buddy: Buddy, this f-----g kid Bobby, if you can't control him, I will knock his f-----g brains in." T. 46-47.

In December 1984, Cafaro and Salerno discuss a problem with another numbers store, operated by Spanish Raymond Marquez, that is paying out too much money on the winning numbers. Cafaro and Salerno discuss the fact that they are "friendly" with Spanish Raymond, but still have to deal with the competitive threat. Cafaro tells an associate, who asks what should be done, "Do what you want." Salerno says: "You know, tell him not to mention our names because we are friendly with that guy." Cafaro asks: "With whom?" Salerno says: "With Raymond." Later, Salerno says: "Well, let them do what they want." Cafaro reports: "I told him, do what you want with the stores, but as far as him, leave him alone." Later, Cafaro reports to Salerno: "So, if you hear that he wants to see you about the stores, that they broke them up or whatever they did, I told them, Go ahead do what youse [*sic*] want, and I said, but leave him alone, I don't want him to get . . . ." Later, Cafaro says: "We ain't going to f--k around with him, we just going to break up any store he puts 9 to 1, we are going to break him up." Later, Salerno asks whether Blood is going to go along with them. Salerno later says: "This has been going on for 50 to 60 years, always trouble with them. They loose [*sic*] $2 and then they start scheming." T. 47-49.

Salerno proffered more than a dozen witnesses who would testify, in substance, that while they had no

knowledge of any of the allegations in the indictment or of facts to support them, that they had known Salerno for many years, considered him a friend, and did not consider him to be any danger to the community.

Salerno also proffered that Fratianno and Lonardo were subject to impeachment on the basis of their criminal pasts and their favorable "deals" with the government.

Salerno also proffered a letter from his doctor since 1977, John H. Laragh, M.D. of the New York-Cornell Medical Center, setting forth the medical history of Salerno, age 74, to include "a long standing history of high blood pressure complicated by congestive heart failure." This condition, first discerned in 1961, has resulted in "serious vascular damage" which despite a "strict medical regimen" has progressed." Dr. Laragh's [*sic*] stated: "Since he has been under our care, we have simplified his medical regimen and accomplished much better blood pressure control." In 1981 Salerno suffered a stroke from which "he has recovered" with some limited residual disability. Dr. Laragh offered no opinion on the impact of a period of detention on Salerno's medical condition.

Salerno proffered no evidence tending to rebut the government's evidentiary proffer relating to Salerno's violent acts and conspiracies and his position as "Boss" of the Genovese Family.

Cafaro proffered no evidentiary material. He argued that the tapes revealed at most "tough talk" and that the government had offered no proof that the violent acts discussed by Cafaro were actually carried out.

DISCUSSION

(a) *United States v. Colombo*

The facts and holding in *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985), are particularly instructive to the court here.[3] In *Colombo*, the defendant, Anthony Colombo, headed a multifaceted criminal enterprise engaged in murder, robbery, narcotics, arson, extortion, threats, assaults, illegal gambling, bribery, theft, and mail and wire fraud.

On the basis of the government's proffer, the magistrate ordered Colombo's detention. Later, after a hearing, the magistrate ordered Colombo's release on the grounds that Colombo as the head of the organization did not personally participate in any violent act and that his ability to orchestrate violent actions was only moderately attenuated by his incarceration. Chief Judge Weinstein concurred with the magistrate's conclusion that the government had failed to establish by clear and convincing evidence that detention was necessary. Finding that the monetary conditions set by the magistrate assured only Colombo's presence at trial, Chief Judge Weinstein set other conditions of release designed to protect the

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[3] In *Colombo*, the charges relating to narcotics triggered the presumption that no condition or combination of conditions would assure the safety of the community. Such a presumption shifts to the defendant the limited burden of production and not the burden of persuasion. *Id.* at 98. Colombo met his burden of production.

In *Colombo*, as in the case before the court, the government had the burden to prove by clear and convincing evidence that no condition or combination of conditions of release would assure the safety of the community. The mere fact that a limited burden was rebutted in *Colombo* but is not present here is not sufficient grounds for distinguishing these cases.

community that are strikingly similar to those proffered by counsel for Salerno in this case. In holding the order of releasing Colombo on the specified bail conditions to be "clearly erroneous," the Court of Appeals stated:

> "The particular danger that Colombo, for purposes of the bail determination, was found to pose—that of alleged supervisor and director of the "Colombo crew"—is hardly alleviated by the type of conditions established by the district court. In light of Congress' direction that "[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate," S. Rep. No. 225 at 7; 1984 U.S. Code Cong. & Ad.News at 3189, we hold that the decision to release Colombo based upon conditions which we consider to be wholly inadequate was clearly erroneous."

Id. at 100.

Colombo also held that consideration of the length of detention due to the probable delay in bringing the case to trial was inappropriate at the pretrial detention hearing since it remained a speculative matter and the Speedy Trial Act, 18 U.S.C. section 3161 *et seq.*, addressed any due process concerns on that score. *Id.* at 100-101.

(b) *Findings*

The court has received a great deal of information about Salerno's danger to the community; it is overwhelming. By "clear and convincing" proof, the government has established that Salerno is the head, or

"Boss," of an organization engaged in extortion, loansharking, illegal gambling, and murder. The government has proffered information and has stated that witnesses will testify that Salerno conspired to murder John Spencer Ullo, Johnny "Keyes" Simone, Danny Green, and John Nardi. The government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community. In addition, Salerno voiced a willingness to "hit" Andrew Giordano in 1984.

Murder is not the only act of violence attributable to Salerno. He is a danger to the community as the "Boss" of an organization that uses force, violence, and threats of force and violence to further its illegal operations. The government proffered substantial information that Salerno's organization uses force and threats of force to maintain its illegal loansharking and gambling operations. These acts are carried out by or ordered by the organization's captain, Cafaro. However, as head of the organization, to whom Cafaro reports, Salerno controls the use of such force.

There is ample information to conclude that Cafaro and others under Salerno's control have the means to carry out the violent acts. The .25 caliber automatic weapon and ammunition found at the apartment shared by Salerno and Cafaro and the Uzi machine gun that Cafaro admitted having in his possession are proof enough that the organization has the ability to commit violent acts. Salerno also has the present ability to order such acts. There is ample

proof that Salerno's organization engages other individuals to commit acts of violence.

Salerno offers several arguments in favor of his release. First, he argues that all the facts alleged in the indictment were known to the government in February 1985, when he was indicted in *U.S. v. Colombo*, 85 Cr. 139, the "Commission" case. He contends that the government should be precluded from moving for detention now because it failed to move for detention then.

But, simply put, not all the facts were known to the government at the time of the "Commission" indictment. Lonardo did not come forward as a government witness until August 1985, several months after the "Commission" indictment. Further, Salerno is not named in any specific murder conspiracy in the "Commission" indictment. Thus, it is far from clear that, at the time of the "Commission" indictment, the cumulative evidence against Salerno supported pretrial detention.

Salerno argues, alternatively, that if the new information were available in August, the government should have moved at that time for detention under section 3142(f) and its failure to do so should preclude this motion. While the government was permitted to seek detention of Salerno in August 1985, when the new information became available, the "first appearance" requirement of 18 U.S.C. section 3142(f) would presently bar such an application in that case at this time. *U.S. v. Resek*, 602 F. Supp. 1126 (S.D.N.Y. 1985). But no such impediment exists under this indictment where the government has moved for detention at the defendant's first appearance. With the "first appearance" requirement under section 3142 satisfied, the Act permits such detention if warranted.

As Salerno concedes, the government's failure to seek his detention earlier in the "Commission" case only effects [*sic*] the weight and credibility of the government's proffer that Salerno poses a danger to the community and does not bar the government from seeking detention under the new indictment as a matter of law. After according the government's proffer the weight it deserves, this court remains firmly convinced that Salerno poses a *present* danger to the community,

At the hearing, Salerno challenged the credibility of two named witnesses for the government, Fratianno and Lonardo. The court has carefully weighed the reliability of these witnesses and the other proffered information against the defendant in determining that he presents a danger to the community.

Although the proffered testimony of witnesses need not be corroborated, the government proffered that it would corroborate some of Fratianno's testimony about the John Spencer Ullo murder. Moreover, both Fratianno and Lonardo have given sworn testimony at other criminal trials which resulted in convictions. T. 15, 67. This court does not rely on the proffered testimony of either Fratianno or Lonardo alone, however, in making its finding. The cumulative nature of the proffered testimony of Salerno's role in murder conspiracies, the taped evidence of Salerno's willingness to kill Giordano, and the taped evidence of Salerno's role as "Boss" of the enterprise establish by clear and convincing evidence that Salerno is a danger to the community.

Salerno requested that Fratianno and Lonardo be produced for cross-examination to attack the credibility of each witness by exploring his criminal past and his agreement with the government. Salerno

made no proffer, however, that the factual account by either witness would contradict the government's proffer. Salerno did proffer that if cross-examined, both witnesses were impeachable based upon their prior bad acts and their "deals with the government." T. 101-103, 121-123.

The court declines to order the production of the witnesses and does rely in part upon the government's proffer as to the substance of their testimony if called. While the court may, in its discretion, order the production of witnesses, the defendant has no automatic right to their production.

At a pretrial detention hearing, many of the rights a defendant enjoys at a criminal trial are absent. The detention hearing is not punitive in nature; it is an involuntary civil commitment proceeding at which proof by a standard less than "beyond a reasonable doubt" is applicable. See *Addington v. Texas*, 441 U.S. 418 (1979). In *U.S. v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982), in upholding the constitutionality of a statute similar to the Bail Reform Act, the court stated:

> [P]retrial detention is not punitive in purpose. Our societal determination that the risk of error in a criminal trial be balanced in favor of the accused is closely tied to the punitive aspects of conviction and has no application to detention pending a trial at which the government will be required to meet the higher burden.

Id., 430 A.2d 1339.

While the defendant at a pretrial hearing may cross-examine witnesses who do testify, such cross-examination may be limited to prevent premature

discovery, protect witnesses' lives or protect ongoing investigations. *U.S. v. Acevedo-Ramos*, 755 F.2d 203, 205 (1st Cir. 1985). Moreover, the government has no obligation to proceed by way of live testimony and a court may rely upon hearsay, including investigatory descriptions of evidence, where the judicial officer reasonably concludes that those descriptions, reports and similar evidence, in the particular circumstances of the hearing, are reliable. In enacting the Bail Reform Act of 1984, Congress did not wish to alter the nature of the informal proceeding at which bail had been set prior to its passage. *United States v. Acevedo-Ramos, supra* at 206-08.

In a case, similar to this one, where the defendant requested the live production of government witnesses, the District of Columbia Court of Appeals, sitting En Banc, required the defendant to at least proffer that the testimony would tend to "negate substantial probability that the accused committed the charged offense" and held that "cross-examination for the purpose of impeaching witness credibility is an insufficient reason to compel a witness' presence." *United States v. Edwards, supra* at 1338.

The government has a substantial interest at this early stage of the case in preventing premature discovery, in protecting the emotional and physical well-being of its witnesses and in preventing impairment of on-going investigations. On the record of this case, the court finds that these interests outweigh any prejudice claimed by Salerno in not being able to directly impeach Fratianno and Lonardo. This prejudice is minimized by Salerno's proffer of impeachment material as to these witnesses, which the court takes into account in reaching its findings, as well as the substantial independent proof against Salerno.

Salerno's proffer of witnesses to testify to his lack of dangerousness to the commmunity is of marginal utility to the court. Such witnesses admittedly know nothing of the allegations in the indictment nor of the facts in support of them. Yet it is precisely those charges and the specific facts supporting those charges, proffered by the government in great detail, that support the government's contention that detention is required. Given the clandestine nature of such organized criminal activity, the fact that many people are unaware of Salerno's behavior and role in the enterprise and thus can be expected to testify as to his lack of dangerousness is neither surprising nor useful to the court in deciding this application. Moreover, the government proffered that one such witness, John Squitieri was a "day-to-day participant in the gambling operation" of the enterprise. T. 157. Squitieri's apparent willingness to lie and his own ties to the enterprise severely undermine any testimony he would give in support of Salerno.

Salerno's proffer of medical testimony is similarly unhelpful. Nowhere does Salerno claim that his vascular condition will affect his ability to run the Genovese Family enterprise if he is released. Nor is it claimed that his condition cannot be treated during detention. Indeed, the court has already directed the Warden of the Metropolitan Correctional Center to permit Salerno to receive his regular medication and to depart from its planned exercise program to permit Salerno to use an exercise bike twice a day, every day.

The proposed conditions of bail proffered by Salerno, characterized by defense counsel as "house arrest," are inadequate to control or diminish the danger posed to the community by Salerno. In fact,

the proposed conditions closely parallel those found clearly erroneous in *United States v. Colombo, supra.*

Under the proposal, Salerno would be closely monitored by the Pretrial Services Agency, restricted to his home from 8:00 p.m. to 7:00 a.m., and limited in his ability to function during the remaining hours. Upon notice, he could travel within the State of New York for legal or medical purposes. He could also attend to business outside his residence with the permission of the Agency, but he would be prohibited from visiting his residence at 115th Street. He would also surrender any valid passports, associate with co-defendants only in the presence of his attorney, and avoid the commission of crimes, including intimidation of witnesses.

As the Second Circuit made clear in *Colombo,* this examination of the intricacies of release is largely academic. The key point is that under these conditions, Salerno, like Colombo, is not prevented from doing the very thing that makes him a danger to the community: running his organized criminal enterprise. The Second Circuit in *Colombo* spoke almost directly to the case at bar:

> In our view, these conditions are clearly inadequate to protect the public from one found for bail purposes to be a danger to the community. Prohibiting [him] from associating with his co-defendants in no way prevents him from meeting with others who are members of a criminal enterprise. . . . Prohibiting him from committing a crime or intimidating a witness does not at all impede his ability to do so, and requires no more of him than that which the law already demands from [him] and every other citizen. . . . Finally, the fact that [he] must surrender his passport

> and post a bond tend merely to assure that he will not flee and do not relate to protection of the community. The particular danger . . . is hardly alleviated by [these] type[s] of conditions.

Colombo, supra, 777 F.2d at 100. Accordingly, the government has established by clear and convincing proof that pretrial detention of Salerno is appropriate in this case.

The indictment alleges that defendant Cafaro is a captain, or "capo," in the Genovese Family. The evidence of Cafaro's violent character and present danger to the community is overwhelming. The government's proffer indicated that Cafaro manages the "enforcement" operations of the enterprise. In order to collect debts and enforce the "two-block" rule, Cafaro directs others, including "Artie," "Freddie," "Blood," "Pete" and his own son, to intimidate and frighten the public with threats of bodily harm and actual brute physical violence. He made such threats himself and, being in the possession of at least one automatic weapon and an Uzi machine gun, had the ability to carry them out. His own words intercepted by electronic surveillance, in which he repeatedly directed others to "knock [people's] f----g brains out," are indicative of Cafaro's propensity for violence. Thus, the government has, by clear and convincing proof, demonstrated that Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future.

The government, therefore, has met its burden of persuasion by clear and convincing evidence that no conditions of Cafaro's release would assure the safety of the community or of any person.

Cafaro joins in Salerno's arguments against detention. Those arguments have even less force with respect to Cafaro. Since he was not indicted in the "Commission" case, the government could not have sought detention earlier as to Cafaro. Moreover, apart from the indictment itself, the proffer as to Cafaro consisted entirely of unimpeachable tape evidence.

Cafaro's contention that his statements which were proffered by the government were merely "tough talk" is rejected by the court. The government has established by clear and convincing evidence that Cafaro was actually conducting the business of the enterprise and that he did so by directing others to commit violent acts.

Cafaro urges the court to consider releasing him on bail on the condition that he not be allowed to go to specified restaurants, social clubs, and offices, and that he surrender his passport, and not associate with other defendants. Such conditions of release would at most assure Cafaro's presence at trial. They in no way assure the safety of the community. Moreover, in view of the substantial evidence proffered, this court cannot envision any set of conditions that could ensure the safety of the community from Cafaro.

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beat-

ings, and murder, the present danger such people pose to the community is self-evident.

Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

ORDER

IT IS HEREBY ORDERED THAT defendants Salerno and Cafaro be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; that they be afforded reasonable opportunity for private consultation with their respective counsel; and that, on an order of a court of the United States or on the request of an attorney for the government, the person in charge of the correction facility in which they are confined deliver them to a United States marshal for the purpose of an appearance in connection with a court proceeding.

SO ORDERED.

Dated: April 2, 1986
New York, New York

/s/ John M. Walker
JOHN M. WALKER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Third day of July one thousand nine hundred and eighty-six.

Docket Nos. 86-1197
86-1198

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY SALERNO and VINCENT CAPARO,
DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Southern District of New York

[Filed July 3, 1986]

Present: HON. WILFRED FEINBERG, Chief Judge,
HON. JON O. NEWMAN,
HON. AMALYA L. KEARSE, Circuit Judges.

These causes came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was [*sic*] argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are vacated and the actions be and they hereby are remanded to the said district court for further proceedings in accordance with the opinion of this court.

FURTHER ORDERED that the mandate be and it hereby is Stayed until the mandate of this court is issued in *United States* v. *Melendez-Carrion* Nos 85-1341, et al. Slip Opinion 3023 (2nd Cir. May 2, 1986).

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

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